Supreme Court, U.S.
FILED
011111 JAN 2 9 2002
OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

ROBERT H. HOFFMANN, HEIDEMARIE KRÜGER, SUSANNE HUSTÄDT, ESTATE OF HENRIETTE HOFFMANN VON SCHIRACH, DR. KLAUS VON SCHIRACH, EXECUTOR, and BILLY F. PRICE,

Petitioners,

v.

UNITED STATES and JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SHELLEY J. CASHION
P.O. Box 580039
Houston, Texas 77258-0039

ROBERT I. WHITE
Counsel of Record
CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN
1200 Smith Street, Suite 1400
Houston, Texas 77002-4310
(713) 658-1818

Attorneys for Petitioners

170993

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

12498

QUESTIONS PRESENTED FOR REVIEW

1. Whether a friendly non-resident alien whose government is not at war with the United States has the same rights as a citizen to compensation when his property in the United States is taken by the United States Government for public use, as this Court held in *Guessefeldt v. McGrath* and *Russian Volunteer Fleet v. United States*, or whether those cases implicitly have been reversed, as the Federal Circuit held, by later decisions of this Court that require a non-resident alien to have a "substantial connection" with the United States to be entitled to other constitutional rights?

2. Whether location of a friendly non-resident alien's property in the United States constitutes a "substantial connection" with the United States, thereby invoking the compensation requirement of the Fifth Amendment when the United States Government takes the property for public use?

3. Whether 400-year-old Anglo-American law that no statute of limitations exists as between a thief and his victim in litigation over the stolen property still possessed by the thief, applies in litigation concerning German private property confiscated by the United States Government in violation of applicable treaties in circumstances amounting to theft?

4. Whether Fifth Amendment due process mandates application of a discovery rule in the following circumstances: the United States Government seized privately owned chattels in Germany in 1950 for use, under the Hague Treaty which obligated the United States Government to return the property and pay compensation for the use; the United States then transported the property to the United States for use, and in 1951, confiscated the privately-owned German chattels in the United States, invoking a statute which expired in 1946. The German

property owner had no knowledge of this illegal confiscation until 1989, because the United States gave no notice other than by publication in the *Federal Register* (which notice, by statute, is valid only as to residents of the United States), despite knowledge of the German owner's name and address?

5. Whether the Federal Circuit denied due process to a plaintiff by denying the right to an appeal from a final judgment against him when the plaintiff was ordered dismissed in one district, and the case was that day transferred to another district which later entered the final judgment against the plaintiff based upon the dismissal order of the transferor court?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Opinions and Orders Entered in the Case	1
Statement of Jurisdiction	1
Constitutional Provision, Treaties and Statutes Involved	1
Statement of the Case	2
A. Facts about the Photographs.	5
B. Facts About the Four Watercolors.	9
Reasons for Granting the Writ	13
I. The Federal Circuit's Holding Is Directly Contrary To Two Cases From This Court That Hold That Non-Resident Aliens Whose Governments Are Not At War With The United States Have The Same Fifth Amendment Rights Against Wrongful Taking Of Their United States Situs Property And The Same Rights To Due Process With Respect To Such Property As United States Citizens	14

Contents

Page

II. The Court Of Appeals Ignored A Four Hundred-Year-Old Tenet Of Anglo-American Law – That A Statute Of Limitations Does Not Exist When A Thief Is In Litigation Over The Stolen Property With His Victim 17

III. The Federal Circuit Has Denied Due Process Protection Of The Fifth Amendment To The German Plaintiffs By Allowing The Government To Rely In 1951 On A Law That Expired By Presidential Proclamation In 1946, And By Holding That The Two Year "Statute Of Limitations" Provided In That Expired Law Shields The Government From Suit Despite The Fact That No Notice Of The "Vesting Order" Under The Expired Law Was Ever Given To Hoffmann Jr. In Germany 21

IV. It Was A Violation Of Fifth Amendment Due Process To Deny Price A Right To An Appeal To The Federal Circuit 25

Conclusion 27

TABLE OF CITED AUTHORITIES

Page

Cases:

American Fidelity Fire Ins. Co. v. United States Dist. Court, 538 F.2d 1371 (9th Cir. 1976) 26, 27

Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509 (10th Cir. 1991) 26

Donovan v. Mazzola, 761 F.2d 1411 (9th Cir. 1985) 22

Guessefeldt v. McGrath, 342 U.S. 308 (1952) .... i, 15, 17

Hill v. Henderson, 195 F.3d 671 (D.C. Cir. 1999) ... 26

Johnson v. Eisentrager, 339 U.S. 763 (1950) 15

Loudner v. United States, 108 F.3d 896 (8th Cir. 1997) 24

Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co., 178 F.2d 866 (2d Cir. 1950) 27

Menzel v. List, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *aff'd as modified*, 279 N.Y.S.2d 608 (App. Div. 1967) (per curiam), *third party claim rev'd on other grounds*, 24 N.Y.2d 91, 246 N.E.2d 742 (1969) 19

O'Keeffe v. Snyder, 83 N.J. 478, 416 A.2d 862 (1980) 19

Cited Authorities

Page

Prescott v. United States, 973 F.2d 696 (9th Cir. 1992) 22

Price v. United States, 707 F. Supp. 1465 (S.D.Tex.1989), 69 F.3d 46 (5th Cir. 1995), *modified on rehearing*, 81 F.3d 520 (5th Cir. 1996), *cert. denied*, 519 U.S. 927 (1996) 3

Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) ..... i, 15, 16, 17

Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958) 23

Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598 (D.C. Cir. 1992) 22

United States v. Hohri, 482 U.S. 64 (1987) 5

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 14, 15, 16

Valentine v. United States, 299 U.S. 5, 10 (1936) .. 7

United States Constitution:

Fifth Amendment ..... *passim*, 58a

U.S. CONST. art. 6 7

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1295(a)(2) 5

28 U.S.C. § 1331 ..... 2, 58a

28 U.S.C. § 1346(a)(2) 2, 5, 58a

28 U.S.C. § 1346(b)(1) 2, 59a

28 U.S.C. § 1367(a) 2, 60a

28 U.S.C. § 2680(e) 22

31 U.S.C. § 3727(a) 2, 60a

31 U.S.C. § 3727(b) 2, 61a

44 U.S.C. § 1508 ..... 2, 23, 24, 61a

50 U.S.C. App. § 33 22

HAWKLAND, UNIFORM COMMERCIAL CODE SERIES §§ 2-403:01, 2-403:04, 2-403:05 (1999) 19

Rule:

Rule 54(b) 4, 26

Cited Authorities

Page

Other Authorities:

The Annex, Hague Convention (IV) Regulations Respecting the Laws and Customs of War on Land 2, 11, 63a-65a

The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study, 70 TEX. L. REV. 1431 (1992) 19

The Rules of Land Warfare, FM-27-10, issued by the United States War Department in 1940 .... 2, 66a-69a

The international law provisions from the Dep't of the Army, Int'l Law Vol. II, Pamphlet 27-161-2 (1962) 2, 70a-83a

President Truman's message of July 9, 1951 (1951 U.S.C.C.A.N. 2358-2359) 2, 84a-85a

3 WILLIAM BLACKSTONE, COMMENTARIES 145-166 ... 19

TABLE OF APPENDICES

Page

Appendix A — Opinion And Order Of The United States Court Of Appeals For The Federal Circuit Denying Petition For Rehearing Dated, Decided And Filed November 6, 2001 ..... 1a

Appendix B — Decision Of The United States Court Of Appeals For The Federal Circuit Dated And Decided August 16, 2001 ..... 5a

Appendix C — Memorandum Opinion Of The United States District Court For The District Of Columbia Dated And Filed June 28, 1999 ..... 23a

Appendix D — Order Of The United States District Court For The District Of Columbia Dated And Filed September 9, 1999 ..... 50a

Appendix E — Opinion On Assignment Of The United States District Court For The Southern District Of Texas Dated And Entered March 24, 1998 ..... 52a

Appendix F — Transfer Order Of The United States District Court For The Southern District Of Texas Dated And Entered March 24, 1998 ..... 57a

Appendices

Page

Appendix G — Constitutional Provision, Statutes, Conventions and Presidential Message Involved 58a

U.S. Const., Fifth Amendment 58a

28 U.S.C. §§ 1331, 1346(a)(2) and (b)(1), 1367(a) 58a-60a

31 U.S.C. § 3727(a) and (b) 60a-61a

44 U.S.C. § 1508 ..... 61a-62a

The Annex, Hague Convention (IV) Regulations 63a-65a

The Rules of Land Warfare, FM-27-10 ..... 66a-69a

Int'l Law Vol. II, Pamphlet 27-161-2 ..... 70a-83a

President Truman's message (1951 U.S.C.C.A.N. 2358) 84a-85a

Petitioners Robert H. Hoffmann, Heidemarie Krüger, Susanne Hustädt, Estate of Henriette Hoffmann von Schirach, Dr. Klaus von Schirach, Executor, and Billy F. Price respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS AND ORDERS ENTERED IN THE CASE

The opinion of the court of appeals on cross-petitions for rehearing is unpublished; the text is reproduced in Appendix A. The original opinion of the court of appeals is also unpublished; the text is reproduced in Appendix B. The opinion of the District of Columbia District Court is reported at 53 F. Supp.2d 483 (D.D.C. 1999); that opinion and the judgment entered by the district court are reproduced at Appendices C and D. The opinion dismissing Price as a plaintiff in the Southern District of Texas is not officially reported; that opinion and the order transferring the case to the District of Columbia District Court are reproduced at Appendices E and F.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on August 16, 2001, and denied cross-petitions for rehearing on November 6, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, TREATIES AND STATUTES INVOLVED

The pertinent provisions of the following constitutional provision, statutes, conventions and presidential message are set forth in Appendix G:

The U.S. Constitution, Fifth Amendment (58a);

Title 28, Judiciary and Judicial Procedure, 28 U.S.C. §§ 1331, 1346(a)(2), 1346(b)(1), and 1367(a) (58a-60a);

Title 31, Money and Finance, 31 U.S.C. § 3727(a) and (b) (60a-61a);

Title 44, Public Printing and Documents, 44 U.S.C. § 1508 (61a-62a);

The Annex, Hague Convention (IV) Regulations Respecting the Laws and Customs of War on Land (63a-65a);

The Rules of Land Warfare, FM-27-10, issued by the United States War Department in 1940 (66a-69a);

The international law provisions from the Dep't of the Army, Int'l Law Vol. II, Pamphlet 27-161-2 (1962) (70a-83a);

President Truman's message of July 9, 1951 (1951 U.S.C.C.A.N. 2358-2359) (84a-85a).

STATEMENT OF THE CASE

While there are three civil actions involved in this case, the record consists of records in five civil actions.[1] Before the 1989 Case and the 1997 Case were transferred by the Texas District Court to the D.C. District Court (and became the 1998 Case in that court), Price was awarded a Federal Tort Claims Act ("FTCA") judgment for damages of $7,949,908 in the 1983 Case, involving the 2,500,000 Hoffmann photographs ("Photographs") and the four

1. The record consists of the records in C.A. H-82-3712 ("1982 Perpetuation of Testimony Case"), C.A. H-83-4969 ("1983 Case"), C.A. H-89-815 ("1989 Case") and C.A. H-97-453 ("1997 Case"), all from the Southern District of Texas, together with the record in 98-CV-857 ("1998 Case") from the D.C. District Court.

watercolors at issue here. *See Price v. United States*, 707 F. Supp. 1465 (S.D.Tex. 1989). Upon the Government's appeal of the judgment in the 1983 Case, in 1995 the Fifth Circuit reversed the FTCA judgment as to the Photographs, holding that the Texas District Court never acquired subject matter jurisdiction because the FTCA suits were filed prematurely.[2] The Fifth Circuit also stated that the Texas District Court had no subject matter jurisdiction as to the Nürnberg Photographs described in a 1951 "vesting order," because there can be no FTCA jurisdiction when the Trading With the Enemy Act ("TWEA") is involved. Finally, the Fifth Circuit held that the Texas District Court never had subject matter jurisdiction over the watercolors because there is no FTCA jurisdiction when a tort claim arises in a foreign country. 69 F.3d 46 (5th Cir. 1995), *modified on rehearing*, 81 F.3d 520 (5th Cir. 1996), *cert. denied*, 519 U.S. 927 (1996).

Six years before the Fifth Circuit's ruling, Price and alternatively the vendors to him of the Photographs and the four watercolors (the "German Plaintiffs") filed a second suit (the 1989 Case) to cure the defense of premature filing of the 1983 Case as to the Photographs. Price and alternatively the German Plaintiffs filed the 1997 Case upon learning facts belatedly furnished by the Government in 1996, in response to discovery efforts filed many years earlier.

After consolidation of the 1989 and 1997 Cases, the Texas District Court ordered further consolidation of the records in the 1983 Case and the 1982 Perpetuation of Testimony Case. Defendants then renewed their Motion to Dismiss and for Summary Judgment, and Plaintiffs filed a Motion for Summary Judgment.

---

2. Government counsel requested the early filing of the amended complaint, agreeing not to raise the early filing issue, in order to consolidate all issues immediately in one case. Six years later, subsequent government counsel reneged.

On March 24, 1998, the Texas District Court published an opinion holding that Price had no standing to sue the Government as to the Photographs and watercolors because his acquisition of ownership violated the Anti-Assignment Act, which precludes an assignee of unliquidated claims from suing the United States. (Appendix E, pp. 52a, 53a-55a and Appendix G, p. 60a.) That court denied the Government's Motion to Dismiss and for Summary Judgment and Plaintiffs' Motion for Summary Judgment and ordered that Price be dismissed from the case. The court then transferred all cases to the D.C. District Court because venue was improper in Texas with only foreign plaintiffs remaining. (Appendix E, p. 55a, and Appendix F, p. 57a.)

That same day the Texas District Court records were shipped to the D.C. District Court. Records in the four cases were received in the D.C. District Court on March 31, 1998, and the 1998 Case commenced that date. Plaintiffs received notification of the March 24, 1998 order of dismissal of Price and transfer to the D.C. District Court by mail several days later. On April 1, 1998, Plaintiffs filed, in the Texas District Court, a Motion for Entry of Judgment against Price under Rule 54(b), and simultaneously another motion to stay all proceedings pending Price's appeal from that Rule 54(b) judgment. The Government did not oppose the entry of judgment but opposed the stay. On April 24, 1998, the Texas District Court denied the Motion for Entry of Judgment.

After the case was transferred to the D.C. District Court, the Government renewed its motion to dismiss and for summary judgment and Plaintiffs opposed. In June 1999, without oral argument, the D.C. District Court published an Opinion granting the Government's motions. (Appendix C, pp. 23a-49a.)[3] On September 9, 1999 the D.C. District Court entered its Final Judgment dismissing the consolidated

3. Reported at 53 F. Supp.2d 483.

complaint of Price and the German Plaintiffs. (Appendix D, pp. 50a-51a.) No final judgment was ever entered as to Price except the judgment of September 9, 1999. Price's appeal to the Federal Circuit involves only Price's dismissal as a plaintiff by the Texas District Court. (*See* Reasons for Granting the Writ, Point IV at p. 25.) Appeals by the German Plaintiffs to the Federal Circuit address the merits of all other issues. The Federal Circuit had jurisdiction over all of the issues in the case because the D.C. District Court had jurisdiction under 28 U.S.C. § 1346(a)(2) (the "Little Tucker Act"), and the Federal Circuit had exclusive jurisdiction of appeals of Little Tucker Act issues under 28 U.S.C. § 1295(a)(2). Because of its Little Tucker Act jurisdiction the Federal Circuit had jurisdiction over all other issues in the case. *United States v. Hohri*, 482 U.S. 64, 75-76 (1987).

This is a summary judgment case in which only the Government moved for summary judgment; consequently, all facts Plaintiffs presented to the D.C. District Court are treated as true, and all inferences are resolved in Plaintiffs' favor. Those facts are briefly summarized as follows:

A. *Facts about the Photographs*.

On his 21st birthday, in 1937, Hoffmann Jr. received a gift of the 2.5 million Photographs then in the archive being used in the family photo business, comparable in size to AP and UPI. Hoffmann Jr. and his father continued to operate the business through World War II. Their Photographs were published in the United States and worldwide, before and during World War II. Due to Hoffmann Jr.'s father's amicable relationship with Hitler, the Hoffmann firm obtained thousands of photographs of Hitler and the German and Nazi personalities of those times. Months before the battles on German soil began, Hoffmann Jr. stored most of the Photographs in a castle ("Winhöring Photographs"). After cessation of hostilities, the United States Army

("Army") found the Winhöring Photographs when it requisitioned the castle as an officers' billet, and in June 1945, all of the Winhöring Photographs were shipped by the Army to "higher headquarters," arriving in June in the Army's Freising Intelligence Center, where Photographs gathered by the Army at other sites were already being stored. The Photographs were picked over and divided by the O.S.S., intelligence agencies, and the War Crimes Commission. A portion of the Winhöring Photographs was ultimately sent by the Army to Nürnberg for use as photographic evidence by the War Crimes Commission ("Nürnberg Photographs"). The Army took the balance of the Photographs to the United States.

Hoffmann Jr. and his father were arrested in May 1945 by the Army and sent to Nürnberg to manage the Nürnberg Photographs. The father was turned over to the German civil government in 1946 and was held in jail until mid-1950. Hoffmann Jr. was kept under arrest at Nürnberg, as a paid employee of the Army, working with the Nürnberg Photographs until the prosecutions ended in 1949. As a consequence, neither Hoffmann had knowledge of what happened to the Photographs other than the Nürnberg Photographs until 1996, when discovery in this case resulted in disclosure by the Government about the Photographs at Freising and those taken under control by the Army in Bavaria and Berlin.

Hoffmann Jr. was adjudicated "uninvolved" in the Nazi war effort by a postwar German court. His father was determined to be a war "profiteer" and was sentenced to forfeit a specific list of assets, which did not include the Photographs or his personally-owned artwork.

During 1946-1949, Hoffmann Jr. was repeatedly assured by his employer – the commander of the Army contingent at Nürnberg – that the Army knew that the Nürnberg Photographs belonged to him, and that such Photographs

would be returned to him when the prosecutions concluded. Nevertheless, the Army Historical Division in the United States, to "obtain a collection of well-known photographic negatives," in 1949 ordered a search in Europe for negatives of the Photographs. The Army Historical Division in Europe located the Nürnberg Photographs but no negatives. The Army in the United States commanded that the Nürnberg Photographs be brought to the United States for use in writing books about World War II. Hoffmann Jr. was advised by personnel in command of the Army Historical Division in Europe that the Army had a continuing need to use the Nürnberg Photographs and when the Army's books were concluded, his Nürnberg Photographs, by treaty, had to be returned to him. Hoffmann Jr. protested the Army's seizure and shipment of the Nürnberg Photographs to the United States, asserting that no other private photo archives were being taken.

Under the Hague Convention (IV) Regulations ("Hague Treaties"),[4] the Army is prohibited from *confiscating* chattels belonging to German citizens, but had the full right, during and after World War II, to *take control over* or *seize* chattels belonging to German citizens. (Appendix G, pp. 70a, 73a-83a.) Pursuant to lawful *seizures*, under the Hague Treaties, the Army could and then did transport Hoffmann Jr.'s Nürnberg Photographs to the United States. Having made seizures, there are concomitant obligations on the Army, imposed by the Hague Treaties, of accounting for, returning and compensating the owners. The Army initially recognized these obligations, then reversed course. Thus, in reviewing Hoffmann Jr.'s protest, Army personnel determined:

- the Army initially took lawful control and custody in 1945, pursuant to the Hague Treaties; those

4. That treaty has the force and effect of a statute adopted and signed by the President. U.S. CONST. art. 6; *Valentine v. United States*, 299 U.S. 5, 10 (1936). *See* Appendix G, pp. 63a-65a.

Treaties required the Army to return the Photographs to Hoffmann Jr.

- in 1950, the Army lawfully seized the Nürnberg Photographs pursuant to the same Treaties and lawfully brought them to the United States.

- even though the Nürnberg Photographs were lawfully seized, under the Hague Treaties the Army did not own the Photographs, and owed Hoffmann Jr. the obligations of return and compensation.

Unable to contradict the clear title that Hoffmann Jr. had to the Nürnberg Photographs, and recognizing that third-party users would have copyright problems, the Army recommended that copyrights to the Nürnberg Photographs be "cleared through the Custodian of Alien Property." In 1951, an Army general and a group of unknown others, specifically to impede any efforts by Hoffmann Jr. to ever regain his Nürnberg Photographs, concocted a plan to obtain bogus paper title to the Nürnberg Photographs by obtaining a "vesting order" under provisions of the TWEA that had lapsed in 1946.

In so proceeding, Government employees and others unknown conspired to commit a knowing act of theft: the Government's TWEA power to vest privately-owned German tangible property not located inside the United States on and prior to December 31, 1946, terminated by presidential proclamation on December 31, 1946. The TWEA was inapplicable to tangible property, owned by Germans, brought to the United States for the first time after December 31, 1946. (Appendix G, pp. 84a-85a.)

The Army personnel involved must have believed their theft of the Nürnberg Photographs would never become an issue: Hoffmann Jr. was in Germany with limited funds, no

command of the English language, and no way to trace what happened. The Alien Property Custodian's minimum obligation as to tangible property in the United States seized prior to 1947, when the TWEA was in effect and authorized seizures, had been, as to property owners *residing in the United States*, at least to publish the "vesting order" in the *Federal Register*. In an effort to color the 1951 "vesting order" with a smattering of authenticity, it was duly published in the *Federal Register* that year.[5] Clearly, the English-language *Federal Register* was never going to come into the hands of Hoffmann Jr. in Germany (who could not read English in any event), and Mr. Green of the Alien Property Custodian's office saw that no other notice was given to Hoffmann Jr. because he papered the file with statements such as, "There are no known valid non-enemy interests in the property which would be affected by the proposed vesting order," notwithstanding the substantial evidence in the file showing that the Nürnberg Photographs belonged to Hoffmann Jr. and the fact that Hoffman Jr. was not an "enemy" within the meaning of the TWEA at the time the vesting order was entered. The Army's file (discovered in 1989) reveals that the "vesting order" was being obtained solely to "strengthen the Army's legal hold" on the Nürnberg Photographs.

Hoffmann Jr. was given no actual notice of entry of the "vesting order" until 1989. Until after 1983, when he and Price requested that all Photographs be turned over to them, Hoffmann Jr. believed that the Army continued to recognize his ownership of the Photographs.

B. ***Facts About the Four Watercolors.***

The four watercolors were painted by Hitler before and during World War I and were the private property of Hoffmann before 1941. The watercolors along with

5. Because of the foregoing factual circumstances, the "vesting order" was termed an "order of theft" by the Texas District Court.

Hoffmann's substantial art collection were stored in a second castle, Schloss Dietramszell, with art collections of several German museums. When the Army requisitioned that castle as an officer billet, the Army discovered the thousands of paintings, took control over them and shipped them to the Munich Collection Point to permit cataloging of the artworks, advertising their location, and returning them to their owners upon presentation of proof of ownership. Because of the situation, under the Hague Treaties, the Army was in lawful possession of all of these works of art. Through this process the Army became agent for the unknown owners, and an express bailment was created. In addition, because the four watercolors were not state-owned property, but rather were private property of an individual German, the Hague Treaties precluded confiscation and imposed affirmative duties on the Army to return the four watercolors to their true owners and pay those owners compensation for any military use. (Appendix G, pp. 63a, 65a, 72a-75a.)

From 1945 until mid-1950 Hoffmann, jailed as a "profiteer," was unable to appear and claim his art collection (although his son Hoffmann Jr. appeared, made claims for paintings that belonged to himself, and obtained turnover of those paintings). When the Munich Collection Point was closed in 1949, the Army shipped all unclaimed art works to the Wiesbaden Collection Point to be turned over to the new German civil government, to continue the return process. In 1950, the commander of the Army's European contingent of the Historical Division toured the Wiesbaden Collection Point and "picked up" the four Hitler watercolors for "addition to the Army's collection." The four watercolors were then seized by the Army under the Hague Treaties and shipped to Alexandria, Virginia in 1950. (*See* Appendix G, pp. 73a-75a.)

The Army has no claim of ownership to the four watercolors under any theory. Rather, the Army remained

merely a lawful possessor with the same duties under the Hague Convention (IV) Regulations, Articles 46, 23(g), 53 and 56 and the law of agency and bailment that it had as to the Photographs.

When Hoffmann was released from prison in 1950, his art collection was gone, and he had no knowledge of what had happened to it. When Hoffmann died, his daughter von Schirach inherited his four watercolors and any interest he had in the Photographs. In 1964, she wrote to the United States Government (in German) asking whether it had possession of the watercolors; the Government replied that it did not have the watercolors, despite the fact that the four watercolors (with no owner identified) were then in the possession of the Army Historical Division.

Incident to writing a book, Price read the Army Historical Division's elaborate brochure about the four Hitler watercolors and obtained permission from the Historical Division to publish photographs of the watercolors in his book. Price at that time noted that the Army's records showed that it had no knowledge of who owned the watercolors.

In 1982, Price's book research led him to von Schirach. When Price showed her the photos of the Army watercolors, she discovered for the first time that the watercolors she had previously questioned the Government about – which she had inherited in 1957 from her father – were indeed in the possession of the United States. Because of her poor health and lack of funds, von Schirach conveyed *ownership* of the watercolors to Price, who agreed to obtain the watercolors from the Army.

In response to later written demands from Price and von Schirach, in 1983 the Army refused to surrender possession of the watercolors. When Price was in Munich in connection with depositions concerning the watercolors, he met

Hoffmann Jr., who conveyed *ownership* of all of the Photographs to Price. Price and Hoffmann Jr. later made written demands on the Army, other relevant Government agencies, and the Alien Property Custodian, all of whom refused to relinquish the Photographs.

All appropriate administrative claims were filed, and in 1989, suit was timely instituted. Discovery efforts showed (in 1996) the 1951 conspiracy to vest title to the Nürnberg Photographs in the Alien Property Custodian using a statute that lapsed in 1946, and ignoring all required notice to the known true owner. A second suit was filed in 1997, and the consolidated cases asked for the following relief:

- Injunctions ordering return of the watercolors and Photographs;

- Little Tucker Act damages of $10,000 per painting for the four watercolors, or $9,000 as a group, upon theories of Fifth Amendment Wrongful Taking, Treaty obligations, and bailment contract;

- Little Tucker Act damages of an average of $21.20 each for the 2.5 million Photographs (approximately $53.8 million) upon theories of Fifth Amendment Wrongful Taking, Treaty obligations, and bailment contract;

- FTCA damages for the tort of conspiracy that occurred prior to the signing of the vesting order, and fraudulent concealment thereof until 1996;

- FTCA damages for conversions in 1983 and 1996 when the Government refused to return the 2.5 million Photographs;

- Under the TWEA for return of the Nürnberg Photographs and damages.

REASONS FOR GRANTING THE WRIT

This case involves one of the thousands of thefts of valuable artworks in Europe incident to World War II. The unique aspect of this theft is that the culprit is the United States Government.

In permitting the United States to retain the fruits of it crimes, the Federal Circuit denied basic constitutional rights to the German Plaintiffs and to Price, and ignored 400 year old basic procedural law. That court held that no friendly non-resident aliens (the German Plaintiffs in this case) have standing to complain under the Fifth Amendment for the United States' wrongful taking without any compensation of their property in the United States. In so holding, the Federal Circuit ignored two contrary opinions of this Court directly in point and held that such opinions had been implicitly reversed by a third opinion dealing with an illegal search and seizure (by United States' standards) of evidence in an alien Mexican defendant's house in Mexico.

In its motion to the Federal Circuit for that Court to publish its opinion in the instant case, the Government characterized the Federal Circuit's opinion as applying to a board spectrum of cases in which non-resident aliens seek to challenge actions of the Government and stated "as such it has broad precedential importance." Denial of Fifth Amendment wrongful taking rights to friendly non-resident aliens with respect to their United States-situs property is of enormous importance in the administration of justice in general, and in the instant case has deprived the German Plaintiffs of in excess of $15,000,000 of property.

As the United States goes forward with worldwide public condemnation of criminal thefts of art treasures incident to war, and resultant prosecutions of its own citizens for pillaging and trading in pillaged artworks, it must act

consistently and with a solid legal foundation. It cannot do so if the judicial branch – the ultimate check on executive misconduct – shields the Government's illegal and unconstitutional behavior.

I.

THE FEDERAL CIRCUIT'S HOLDING IS DIRECTLY CONTRARY TO TWO CASES FROM THIS COURT THAT HOLD THAT NON-RESIDENT ALIENS WHOSE GOVERNMENTS ARE NOT AT WAR WITH THE UNITED STATES HAVE THE SAME FIFTH AMENDMENT RIGHTS AGAINST WRONGFUL TAKING OF THEIR UNITED STATES SITUS PROPERTY AND THE SAME RIGHTS TO DUE PROCESS WITH RESPECT TO SUCH PROPERTY AS UNITED STATES CITIZENS

Holding that the Fifth Amendment wrongful taking provision extends to aliens only "when they have come within the territory of the United States and developed substantial connections with this country," *citing United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990), the Federal Circuit, after ignoring the basic law that no statute of limitations exists in litigation over stolen property between the thief and his victim (Point II, *infra*) held that Plaintiffs "have failed to establish 'substantial connections' to the United States" so as to entitle them to claim protection of the Fifth Amendment's wrongful taking clause. That holding disregards the fact that the issue here is a property issue, not a personal rights issue, and that the German Plaintiffs' properties had the only contact necessary as to property: it was physically in the United States, having been brought into the United States by the Army.

The cases relied upon by the Federal Circuit address entitlement to personal constitutional privileges. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (in a suppression of evidence context, the issue was whether a Mexican had a right to be free from illegal search and seizure in Mexico); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (*habeas corpus* rights of German soldiers in Germany). It makes eminent sense that application of such personal privileges should not be given effect outside the confines of the United States: to rule otherwise would be to require the United States to enforce its laws in foreign countries. Thus, those personal constitutional privileges are inapplicable if the alien is not physically within the United States at the time he is deprived of personal constitutional rights or privileges.

That rationale has no application to property that is physically located within the United States, especially when the Government has brought the property into the United States and then converts the property in the United States. For that reason, the only cases from this Court that have examined the Fifth Amendment in the context of non-resident alien-owned property physically located in the United States have given full protection of the Takings Clause to that property. For example, in *Guessefeldt v. McGrath*, 342 U.S. 308, 318 (1952), a German national sought return of his property under the TWEA. Although the question there was whether the German could be independently viewed as "friendly" to the United States even though by statute he was deemed an "enemy" because his country was at war with the United States, this Court, in reviewing the property issues, stated, "It is clear too that friendly aliens are protected by the Fifth Amendment requirement of just compensation."

The case cited by this Court in *Guessefeldt v. McGrath* was *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931). In that case, a Russian corporation with no place of

business in or other contacts with the United States purchased from an assignee contracts for the construction of two ships in New York. During World War I, the Government, acting under authority of the United States Shipping Board Emergency Fleet Corporation, requisitioned the contracts and the ships being constructed thereunder for the benefit of the United States. The Government thereafter sought to avoid payment for the ships by urging that the United States had not then recognized the Union of Soviet Socialist Republics and thus the alien corporation had no right to sue in the United States. In rejecting this argument, this Court said (282 U.S. at 489):

> [T]he petitioner is a corporation duly organized under the laws of Russia. . . . There was no legislation which prevented it from acquiring and holding the property in question. The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. *Wong Wing v. United States*, 163 U.S. 228, 238; compare *Yick Wo v. Hopkins*, 118 U.S. 356, 369; *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 396; *Truax v. Raich*, 239 U.S. 33, 39; *Terrace v. Thompson*, 263 U.S. 197, 216; *Home Insurance Co. v. Dick*, 281 U.S. 397, 411. Exerting by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation. . . .

The cases relied upon by this Court in *Russian Volunteer Fleet*, which generally extended constitutional protections to aliens physically in the United States, have been construed by later cases as being inapplicable to aliens not within the physical confines of the United States. *E.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990). This court has *never* limited the application of the Fifth Amendment takings

clause to foreign-owned property located in the United States, and *Russian Volunteer Fleet* remains good law today.

In the instant case, the German Plaintiffs' Nürnberg Photographs were brought to the United States by the Army over assurances given by ranking United States Army officers that, under the Hague Treaties, the properties would be returned to Hoffmann Jr. after the Government's use was concluded. The Army brought the rest of the Photographs and the watercolors to the United States, with no knowledge of who owned those properties. All of the Photographs and the watercolors were physically in the United States when the Government asserted that it, rather than the German Plaintiffs, owned the properties and the Federal Circuit held that the German Plaintiffs have no Fifth Amendment wrongful taking rights. The German Plaintiffs' contacts with the United States are sufficient to invoke the teachings of *Guessefeldt v. McGrath* and *Russian Volunteer Fleet.*

II.

THE COURT OF APPEALS IGNORED A FOUR HUNDRED-YEAR-OLD TENET OF ANGLO-AMERICAN LAW – THAT A STATUTE OF LIMITATIONS DOES NOT EXIST WHEN A THIEF IS IN LITIGATION OVER THE STOLEN PROPERTY WITH HIS VICTIM

The judgment of the Federal Circuit permits the United States to ignore the Hague Treaties governing the conduct of the Army during a military action, here, World War II. Under the Hague Treaties' obligations, during the occupation of Germany, private property could neither be destroyed nor confiscated by the Army, but could be seized for the Army's use. However, such seizure required return of the property,

and compensation.[6] The only exception to that no-confiscation rule existed in circumstances where the Hague Treaties did not apply – when German tangible property was physically in the United States before December 31, 1946. (Appendix G, pp. 84a-85a.) The Army abrogated these rules in this case by first lawfully (under the Hague Treaties) seizing the privately owned German property in Europe in 1950 (the Nürnberg Photographs), lawfully (under the Hague Treaties) bringing that property to the United States in 1951, and then in violation of the Hague Treaties, confiscating the property in the United States using a law that expired December 31, 1946, to enter a "vesting order" under that law (the TWEA). (Appendix G, pp. 84a-85a.) The United States thus did indirectly what the Hague Treaties precluded it from doing directly. The confiscation of the Nürnberg Photographs was effected in 1951 and was camouflaged by using a statutory "vesting order" mechanism that expired in 1946.[7] That illegal confiscation casts the Government as a thief with respect to the Nürnberg Photographs.

The Federal Circuit ignored the facts of the theft – which are uncontroverted by the Government – and the legal ramifications of that theft, and concerned itself with statute of limitations issues in cases other than those involving a claim against a thief by his victim over the stolen property.[8]

6. Appendix G, pp. 70a, 72a-82a.

7. A general in an administrative unit of the Army actually wrote a memorandum that the "vesting order" was being sought "to strengthen the Army's legal hold" on the Nürnberg Photographs.

8. Such process has enabled the courts below to script opinions to fault Plaintiffs (1) for failing to contest, by 1953, entry of a vesting order with respect to the Nürnberg Photographs, that was not disclosed to the German-property owner in Germany until 1989, (2) for failing to prove that the Government acted as a fiduciary with respect to the watercolors, and (3) ultimately, for failing to acquire a

(Cont'd)

In such cases, when the thief is caught with the stolen property, as between the thief and the owner of the stolen property, no statute of limitations exists, and thus no bar to suit ever exists as between those parties.

This rule has existed in Anglo-American law since before the days of Blackstone and has equal vigor today. 3 WILLIAM BLACKSTONE, COMMENTARIES 145-166; *O'Keeffe v. Snyder*, 83 N.J. 478, 416 A.2d 862 (1980); *Menzel v. List*, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *aff'd as modified*, 279 N.Y.S.2d 608 (App. Div. 1967) (per curiam), *third party claim rev'd on other grounds*, 24 N.Y.2d 91, 246 N.E.2d 742 (1969); discussion in HAWKLAND, UNIFORM COMMERCIAL CODE SERIES §§ 2-403:01, 2-403:04, 2-403:05 (1999); Note, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1445 (1992).

Possession by the United States in Europe of all of the Photographs from early in May 1945, later seizure and use of those Photographs, and then their transportation to the United States for further use, started no statute of limitations because the possession, seizure and transportation were lawful under the Hague Treaties. (*See* Appendix G, pp. 64a-65a and pp. 73a-82a.) The seizures of the Photographs justify and allow possession for as long as the Government needs to use the chattels, in Europe or in the United States. If the property owner asks the Government for return and the Government refuses, the Government in effect is simply responding that its use of the chattels is not over. Lawful possession continues. The important legal point is that under no circumstances can the Government acquire title or

---

(Cont'd)
physical presence in the United States, which the court deemed a prerequisite for the German Plaintiffs to raise Fifth Amendment wrongful taking claims. *See* Point I.

ownership through some statute of limitations concept during its possession pursuant to seizure under the Hague Treaties.

For this reason, the Federal Circuit erroneously faulted Plaintiffs for failing to prove that the Army acted as a fiduciary; such a concept is not an exception to the Hague Treaties, the statute proscribing Army confiscation of German private property but permitting the Army to seize that private property for use.

The court of appeals has turned a blind eye to the 400-year history of Anglo-American jurisprudence that precludes any statute of limitations in litigation between a thief and his victim. Surely the Court cannot permit the Government to escape liability to the property owner by blessing the Army's abuse of the Hague Treaties proscribing confiscation of private property, by ignoring the law that no statute of limitations exists in litigation between the thief and his victim, and by permitting the Government to utilize (in 1951) provisions of the TWEA that lapsed in 1946 (Point III, *infra*), and then allowing the whole process to go forward with no notice to the property owner in Germany. *Ibid.* The Government has prevailed in this case as a result of the Federal Circuit ignoring patent procedural and substantive due process violations.

If the Government is permitted to retain the Nürnberg Photographs, then the Army, in substance, will have succeeded in confiscating the Nürnberg Photographs in derogation of the Hague Treaties, and in its violations of procedural and substantive due process. Such result makes a mockery of the law and of any Government criminal prosecution of individuals for war-time thefts of private artworks.

III.

THE FEDERAL CIRCUIT HAS DENIED DUE PROCESS PROTECTION OF THE FIFTH AMENDMENT TO THE GERMAN PLAINTIFFS BY ALLOWING THE GOVERNMENT TO RELY IN 1951 ON A LAW THAT EXPIRED BY PRESIDENTIAL PROCLAMATION IN 1946, AND BY HOLDING THAT THE TWO YEAR "STATUTE OF LIMITATIONS" PROVIDED IN THAT EXPIRED LAW SHIELDS THE GOVERNMENT FROM SUIT DESPITE THE FACT THAT NO NOTICE OF THE "VESTING ORDER" UNDER THE EXPIRED LAW WAS EVER GIVEN TO HOFFMANN JR. IN GERMANY

As pointed out (p. 18, *supra*), German tangible property must have been physically in the United States on or before December 31, 1946, to be subject to "vesting" under the TWEA. Vesting authority under the TWEA ceased on December 31, 1946, as to German tangible property brought to the United States after that date, because trade between Germany and the United States resumed January 1, 1947. Thereafter, German property moved freely into and out of the United States.

The vesting order in this case was entered in 1951 with respect to tangible German property the Army first seized in Germany (under the Hague Treaties) and then brought to the United States in late 1950. That 1951 vesting order was void *ab initio* and had no legal force and effect because the Government's acts were *ultra vires*: the property was brought to the United States after trade with Germany had resumed, *and* all power under the TWEA to vest any German property brought into the United States (including the Nürnberg

Photographs) had ceased December 31, 1946, after resumption of trade with Germany.[9] The legal result as to this facially-void vesting order is as though it had never been signed. The TWEA is not further involved, and the Government's duties and obligations of accounting for, returning, and compensating the owners of the Nürnberg Photographs are established by the Hague Treaties and/or the law of bailment.

The Federal Circuit ignored all of the foregoing[10] and allowed the Government to rely on a statute of limitations

9. "Agency actions beyond delegated authority are '*ultra vires*,' and courts must invalidate them." *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992).

10. The Federal Circuit concluded that the German Plaintiffs had a "full and fair opportunity to litigate this exact issue" (App. B, p. 18a) in the Southern District of Texas, a holding that stretches the facts of the case beyond recognition. The Government made a strategic decision not to rely on the vesting order and did not raise the vesting order until nine years into the case, after summary judgment had been entered against the Government. The vesting order was a fact that had to be proved before any argument under 28 U.S.C. § 2680(e) (FTCA exceptions) or 50 U.S.C. App. § 33 (TWEA) could be made. Having failed to raise the matter timely, doing so after a grant of summary judgment was too late, and the Southern District of Texas so held. *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992) (government bears the burden of proving exception to FTCA jurisdiction); *Donovan v. Mazzola*, 761 F.2d 1411, 1416 (9th Cir. 1985) (only a judgment showing a jurisdictional defect on its fact is subject to collateral attack). Clearly, the issue was never litigated in the Southern District of Texas — indeed, that court struck the Government's post-summary judgment pleadings raising the issue for the first time.

Just before oral argument in the Fifth Circuit, that court raised the vesting order issue *sua sponte*. Since the Fifth Circuit never considered the issue except in the context of FTCA jurisdiction, the constitutional issues raised herein were never litigated in the Southern District of Texas, much less "fully and fairly litigated," as characterized by the Federal Circuit.

under the TWEA that had ceased to be applicable to the Nürnberg Photographs at issue December 31, 1946. Such holding is obviously a due process violation.

Further the Federal Circuit's decision holds that Hoffmann Jr.'s claim against the Government arose in 1951, when the "vesting order" was entered, and concludes that the only remedy the German Plaintiffs had was a right to sue under the TWEA within two years of the date of the vesting order. (Appendix G, pp. 61a-62a.) That decision ignores the law that no statute of limitations exists when the thief is involved in litigation with the property owner, and that the constitutional infirmities inherent in this "vesting order" could never be cured by the expiration of the two-year statute of limitations for suit under the TWEA.

In 1951, the Government knew that Hoffmann Jr. was the owner of the Nürnberg Photographs, knew that he was not an "enemy" within the meaning of the TWEA, and knew how to contact him. Nevertheless, the Government gave no actual notice of the vesting order to Hoffmann Jr. (or to anyone else), instead publishing notice only in the *Federal Register*. By statute, notice in the *Federal Register* is sufficient only as to people within the United States. 44 U.S.C. § 1508. (Appendix G, pp. 61a-62a.) Such notice by publication is insufficient, however, even as to a person living within the United States, when more effective means of giving notice – such as actual notice to a known claimant with a known address – exists. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958):

> Past decisions of this Court emphasize that this summary power to seize property [under the TWEA] which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of

> the [Trading with the Enemy] Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure.

See also 44 U.S.C. § 1508 (a notice of hearing or of opportunity to be heard is sufficient in law when published in the *Federal Register* only for persons residing in the United States).

A useful analogy is shown in *Loudner v. United States*, 108 F.3d 896, 902 (8th Cir. 1997). There, Sioux Indians who resided in the United States sought to claim their share of a judgment fund created by Congress. They failed to make their claims within the six-year period granted by the statute. The Government had published notice of the fund in the *Federal Register*, but failed to use resources within its files that showed names and addresses of family members and ancestors of the Sioux tribe. Just as it has done here, the Government raised sovereign immunity as a bar to payment because of the statute of limitations. The court reasoned (108 F.3d at 901 n.2, 902):

> The way that courts have historically applied the statute of limitations to claims challenging so-called trust repudiations provides support for our approach. Where the trustee repudiates the trust by claiming to hold the trust corpus as the trustee's own, the cause of action does not accrue until the beneficiary "has knowledge of the repudiation." . . .
>
> We think that notice by publication is insufficient to begin the running of the statute of limitations against a beneficiary who is unaware of the trust's existence, unless there is no reasonable alternative. Because the steps that the government actually took were insufficient to put

> a reasonably diligent beneficiary on notice of the trusts' existence, the plaintiffs' claims are not time-barred. . . .

Likewise, pursuant to the German Plaintiffs' discovery of the existence of the vesting order in 1989, their 1989 TWEA action seeking return of the Nürnberg Photographs (and damages to the extent the Government cannot return the Photographs) is timely. Since Hoffmann Jr. never received actual notice of the vesting order in 1951 – despite the Government's possession of Hoffmann Jr.'s name and address and knowledge of his ownership and non-enemy status – even if the Government, as a thief, is permitted a statute of limitations defense, and the TWEA provision that expired in 1946 is somehow viewed as revitalized in 1951 without legislative intervention – the statute of limitations did not start to run against the German Plaintiffs until 1989, when the Government raised the "vesting order" issue in the Texas District Court for the first time, well after summary judgment had been granted for Plaintiffs.

IV.

IT WAS A VIOLATION OF FIFTH AMENDMENT DUE PROCESS TO DENY PRICE A RIGHT TO AN APPEAL TO THE FEDERAL CIRCUIT

The Federal Circuit declined to review Price's challenge to the order by the Texas District Court (Appendices E and F, pp. 52a-57a) dismissing him as a party plaintiff, holding that once a motion to transfer has been granted and the action transferred, the losing party must make a motion to retransfer the case in the transferee district court to preserve the issue for appeal. (Appendix B, pp. 12a-13a.) The cited rationale is inapposite here for three reasons: Price was out of the case as a result of the order of his dismissal. But no

judgment was entered against Price by the Texas District Court, and it was not until the D.C. District Court's judgment that Price's complaint was dismissed by a "final judgment." (Appendix D, pp. 50a-51a.) Price could not appeal from the Texas District Court's order that Price be dismissed because of the final judgment rule, and he is entitled by statute to appeal from the judgment against him entered by the D.C. District Court.

At issue is not the transfer order, but the dismissal of Price as a party plaintiff. Once the order dismissing Price was entered, the transfer from the Texas District Court to the D.C. District Court took place as a matter of course, because no basis for venue remained in the Texas District Court. The authorities cited by the Federal Circuit address motions to transfer, not motions to dismiss that have the effect of mandating a change of venue. The manner in which the transfer of the cases took place deprived Plaintiffs of any opportunity to appeal or seek mandamus in the Fifth Circuit, because absent the entry of a Rule 54(b) judgment by the Texas District Court *before* it transferred the record, the Fifth Circuit would have no jurisdiction on an appeal in 1998. *Hill v. Henderson*, 195 F.3d 671, 678 (D.C. Cir. 1999); *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1518 (10th Cir. 1991).

Furthermore, the Federal Circuit is a court of national jurisdiction, and Price's appeal could have come from a judgment of the Texas District Court, as well as a judgment from any other district court in the United States. Since all pre-transfer orders of the transferor court are reviewable after judgment by the transferee court's court of appeals (here, the Federal Circuit because this is a Little Tucker Act case), upon entry of judgment against Price by the D.C. District Court (Appendix D, pp. 50a-51a), upon Price's appeal to the Federal Circuit, that court must review the dismissal of Price as a plaintiff. *American Fidelity Fire Ins. Co. v. United*

States Dist. Court, 538 F.2d 1371, 1377 n.4 (9th Cir. 1976); *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 870 (2d Cir. 1950).

Most importantly, it is a violation of Fifth Amendment due process for Price to be denied an appeal from the final judgment entered against him by the D.C. District Court.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari to the Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

ROBERT I. WHITE
Counsel of Record
CHAMBERLAIN, HRDLICKA,
WHITE, WILLIAMS & MARTIN
1200 Smith Street, Suite 1400
Houston, Texas 77002-4310
(713) 658-1818

SHELLEY J. CASHION
P.O. Box 580039
Houston, Texas 77258-0039

Attorneys for Petitioners